II. The Ninth Circuit's interpretation of *Block* creates a conflict between circuits.

Respondents argue (Opp. at 13) that there is no conflict between the circuits on the availability of the *ultra vires* exception to sovereign immunity where Indian land is involved. The respondents' attempt to distinguish *Florida*[3] and *South Dakota*[4] is unconvincing. The Ninth Circuit's decision in *Foster* is in direct conflict with these decisions.

In *South Dakota* the Eighth Circuit struck down an agency decision creating Indian land on the basis that the statute under which the Secretary acted was unconstitutional. The court rejected the ruling of the district court that it was without jurisdiction to review the decision under the QTA. 69 F.3d at 881 n.1. *South Dakota* represents a classic application of the *ultra vires* exception to review a Secretarial decision to create Indian land. As the Ninth Circuit had previously affirmed in *Albert*, the *ultra vires* exception applies to agency action that is beyond the scope of the agency's limited power or where the agency

---

jurisdiction, whether the disputed property is mineral land. The Allotment Act prohibits Native allotments on either appropriated land or mineral land. *Frank Sanford*, 119 IBLA 147 (1991). Since it is undisputed that the land was appropriated to Alaska before Foster began using it, the state needs to prove nothing more in order to establish Interior's decision as both statutorily prohibited and unconstitutional.

[3] *Florida v. U.S. Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

[4] *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), petition for cert. pending, No. 95-1956.

acts unconstitutionally or pursuant to an unconstitutional statute. 38 F.3d at 1076.[5]

The respondents seek to limit the application of *South Dakota* by arguing that the court exercised jurisdiction only in the constitutional context. However, Alaska has already demonstrated above that it has asserted a constitutional challenge to the Secretary's actions in this case. Thus, *Foster* may not be distinguished from *South Dakota* on this basis.

The Eleventh Circuit affirms that courts have jurisdiction to review agency decisions creating Indian land if those decisions are alleged to be unconstitutional or beyond the agency's statutory authority. *Florida*, 768 F.2d 1248, 1251-52. The respondents argue (Opp. at 13) that *Florida* does not address *Block's* unambiguous holding regarding the exclusive remedy of the QTA and should therefore be ignored by this Court. The respondents are wrong. The court in *Florida* recognized and applied *Block*. 768 F.2d at 1254-55. However, at the end of its discussion of *Block*, the Eleventh Circuit stated that the case before it was distinguishable from those situations where "the Secretary acted unconstitutionally or beyond his statutory authority when the United States acquired title to the land." 768 F.2d 1255 n.9. Until recently, the Ninth Circuit agreed with this statement. *Albert*, 38 F.3d 1068, 1076 (9th

---

[5] The Ninth Circuit's first opinion in *Foster* was consistent with *Albert* and *South Dakota* in finding the *ultra vires* exception available as a jurisdictional base in the context of alleged unconstitutional action. *Foster*, 67 F.3d 864, 867 n.3 (9th Cir. 1995) (Allegedly unconstitutional actions subject the sovereign "to a *per se* divestiture of immunity.").

Cir. 1994); *Lee v. United States*, 809 F.2d 1406, 1409 n.2 (9th Cir. 1987); *Donnelly v. United States*, 850 F.2d 1313, 1317-18 (9th Cir. 1988).[6]

Even without a conflict among the circuits, this case raises an issue of national importance concerning the continuing vitality of the *ultra vires* exception to provide a jurisdictional basis for the review of unconstitutional or statutorily unauthorized agency action in creating Indian trust land. This issue is not unique to Alaska but affects all States as is evident from the decisions cited above.

III. Administrative finality is inapposite to the jurisdiction of the court.

The respondents' argument (Opp. at 16-19) concerning administrative finality is not addressed to the question before this Court, to wit: whether a federal district court has jurisdiction to review an agency decision creating Indian land at the time that decision is first applied against a specific property interest. Whether administrative finality should be applied in this case is properly considered only after the court exercises its subject-matter jurisdiction.

The respondents' argument (Opp. 16-19) that Alaska failed to timely raise its objections to the Foster allotment

---

[6] *Cert. denied sub nom. Donnelly v. Eklutna, Inc.*, 488 U.S. 1046 (1989). The respondents decline to explain their disagreement with Alaska's characterization of *Lee* and *Donnelly*, preferring instead to rely on the hope that this Court will refuse to review an intra-circuit conflict. However, the *Foster* decision is in conflict with two other circuits, as is demonstrated above.

disregards the Ninth Circuit's holding in *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991). Under *Wind River*, Alaska had six years to challenge the approval of the Foster allotment measured from 1993, the date the allotment approval was first applied to cancel Alaska's right-of-way for the Parks Highway. Alaska's challenge was filed within six months of that final agency action. Therefore, even if properly before the Court on this petition, administrative finality is inapplicable.

The respondents also claim that Alaska waived its constitutional and statutory authority arguments by failing to raise them before the agency or the district court. Alaska has not waived these arguments. They are fairly subsumed in Alaska's claim that the QTA Indian land exception does not deprive the courts of jurisdiction where the Secretary acts *ultra vires*. Moreover, the issue before this Court is one of subject-matter jurisdiction. Jurisdictional and constitutional issues may be considered at any time, even if not explicitly raised. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1361 n.14 (9th Cir. 1978), *rev'd sub nom. on other grounds, Lake Country Estates Inc., v. Tahoe Regional Planning Agency*, 443 U.S. 391 (1979); *Turner v. McMahon*, 830 F.2d 1003, 1008 (9th Cir. 1987), *cert. denied*, 488 U.S. 818 (1988).

CONCLUSION

Alaska's petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE M. BOTELHO
Attorney General

E. JOHN ATHENS, JR.
Counsel of Record
Assistant Attorney General
State of Alaska

PAUL R. LYLE
Assistant Attorney General
State of Alaska

Office of the Attorney General
100 Cushman Street, Suite 400
Fairbanks, Alaska 99701
Telephone: (907) 451-2811

Attorneys for Petitioner